

1995

Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology

Danielle M. Wagner

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Danielle M. Wagner, *Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology*, 33 Duq. L. Rev. 931 (1995).

Available at: <https://dsc.duq.edu/dlr/vol33/iss4/7>

This Comment is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology

Though the earth and all inferior creatures be common to all men, yet every man has a "property" in his own "person." This nobody has any right to but himself.¹

INTRODUCTION

The issue of whether the human body constitutes property has become important due to advances in organ transplantation and the field of biotechnology. Advances in biotechnology have created new uses for bodily tissues which many thought had no use or value after removal.² Presently, bodily tissues can be used in transplantation, research, education, and commercial endeavors.³ Although human tissues and organs are usually donated and cannot be bought and sold like other consumer goods,⁴ they still possess a strong commercial value⁵ due to their increased use in the biotechnology industry to treat a wide range of illnesses and injuries.⁶

1. John Locke, *Concerning Civil Government, Second Essay*, in 35 GREAT BOOKS OF THE WESTERN WORLD 23, 30 (R. Hutchins ed., 1952).

2. Erik S. Jaffe, Note, "She's Got Bette Davis[s] Eyes": Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses, 90 COLUM. L. REV. 528, 528 (1990); see also SHELDON KRIMSKY, *BIOTECHNICS & SOCIETY: THE RISE OF INDUSTRIAL GENETICS* (1991); PAT SPALLONE, *GENERATION GAMES: GENETIC ENGINEERING AND THE FUTURE FOR OUR LIVES* 38 (1992) (discussing the biotechnology industry).

3. Jaffe, cited at note 2, at 528.

4. See *Onyeausi v. Pan Am*, 952 F.2d 788, 792 (3d Cir. 1992). See notes 150-71 and accompanying text for a discussion of the prohibition of the sale of human organs.

5. See ANDREW KIMBRELL, *THE HUMAN BODY SHOP: THE ENGINEERING AND MARKETING OF LIFE* 1 (1993). Medical schools and hospitals use human cadavers for training and for experimentation. See *Onyeausi*, 952 F.2d at 792. In addition, human tissues and organs have an inestimable value in transplant operations. *Id.*

6. See Joan O'C. Hamilton, *Miracle Cures May Be in Your Cells*, BUSINESS WEEK, December 6, 1993, at 76. The new technology, called "cell therapy" or "tissue engineering," is based on the concept that "perhaps only cells are smart enough to correct certain defects in the body." *Id.* For example, one biotech company,

The recent surge in the biotech industry⁷ has yielded a potential billion dollar market for cells and other by-products of cells.⁸ The main reason such cells and by-products have become so valuable is because human-made organisms are patentable.⁹ The increased demand for transplant organs is also due to the extreme organ shortage.¹⁰ The increase in the number of possible uses for body parts and tissues necessitates a reconsideration of the legal nature of the human body.

The purpose of this comment is to demonstrate the need for uniform laws which would provide for possessory rights in the body and allow a degree of commercialization and compensation depending upon the nature of the organ or body part being used medically or scientifically. This comment also reveals the lack of any consistency or practicality in the manner in which the issue of property rights in the body are currently being addressed. Section II of this comment discusses the history of the body as property. Section III closely examines a case which addressed the issue of conversion of the body's cells. Section IV addresses the

BioSurface Technology, Inc. of Cambridge, Massachusetts, sells sheets of epidermal tissue or skin which are made by taking a small square inch piece of a patient's own skin and expanding it by ten thousand times — enough to cover a person's entire body. *Id.* at 77. Another goal of biotech companies is to build transplant ears, noses and other facial features by seeding human cartilage cells onto a polymer mold and growing them into the proper shape. *Id.* This technology could be used to correct facial damage resulting from genetic defects, accidents or cancer radiation therapy. *Id.* A much more commercially valuable advance is the growth of cartilage that makes up the lining of the knee. *Id.* Approximately 1.4 million patients in the United States could benefit from such an advance. *Id.* Presently, doctors can only remove damaged cartilage and replace the knee. *Id.* Another biotech company, Cell Genesys Inc., in California, is attempting to create "universal donor cells" by destroying parts of the cell type which identify a cell as belonging to a particular person. *Id.* Such an advance could produce transplantable cells which could be used to "treat everything from eye damage to cancer — bringing an end to the need for donor-matching." *Id.* at 78.

7. Over 200 public companies are in the biotechnology business and a dozen companies are registered to sell more stock, which is an indicator of a good market. Joan O'C. Hamilton, *A Little Dose of Government Won't Kill Biotech*, BUSINESS WEEK, Feb. 28, 1994, at 65. In 1993, biotech companies received \$3 million from the government. *Id.*

8. Jaffe, cited at note 2, at 530.

9. See *Diamond v. Chakrabarty*, 447 U.S. 303 (1980). The United States Supreme Court held that live human-made micro-organisms were patentable subject matter because a new organism was created which had "markedly different characteristics from any found in nature." *Diamond*, 447 U.S. at 310. This patentability created monetary incentives which led to the commercialization of research and transplantation. See Jaffe, cited at note 2, at 529. For a discussion of the patentability of living organisms, see SPALLONE, cited at note 2, at 114 and KIMBRELL, cited at note 4, at 188.

10. See notes 103-17 and accompanying text for a discussion of the shortage of organ donors.

urgent need for organs for transplantation. Section V discusses property rights in and the sale of renewable body parts, such as blood, sperm and hair. Section VI examines the statutes which govern the sale of organs. Section VII addresses the right of a person to control the disposal of his/her body by will. Section VIII addresses the constitutional issues involved in property rights in the body. Section IX analyzes the arguments both for and against compensation for body organs and parts. Finally, Section X proposes solutions to the problems which result from not recognizing a property right in the body.

SECTION II — THE BODY AS PROPERTY

A property right is not unitary. Rather, it is often described as a "bundle of rights."¹¹ These rights include the right to possess, the right to exclude, the right to use, the right to dispose, the right to enjoy fruits or profits, and the right to destroy.¹² An individual does not need to possess all of the rights in the bundle in relation to an object in order to have "property rights" in that object.¹³ Property rights are not absolute, but are limited to the extent that they may not be exercised to interfere with another's property rights.¹⁴

Arguably, a person has property rights in his or her own body¹⁵ because the rights that exist in relation to the human body bear a strong resemblance to those rights traditionally classified as property rights.¹⁶ For example, the right to possess the body is evidenced by the prohibition of slavery and false imprisonment.¹⁷ The right to use the body is evidenced by the validity of employment contracts.¹⁸ The right to exclude others from contact with the body is evidenced by assault and battery laws.¹⁹ However, rights in the body are not absolute.²⁰

Many oppose recognition of property rights in the body on the basis that the human body lacks an essential attribute of proper-

11. See *Brotherton v. Cleveland*, 923 F.2d 477, 481 (6th Cir. 1991).

12. See Jaffe, cited at note 2, at 528.

13. *Id.*

14. *Id.* at 549.

15. See *Moore v. Regents of the University of California*, 793 P.2d 479, 517 (Cal. 1990) (Mosk, J., dissenting).

16. Jaffe, cited at note 2, at 559.

17. *Id.* at 546.

18. *Id.*

19. *Id.*

20. *Id.* The right to use the body is limited by laws prohibiting prostitution and sodomy. *Id.* The right to exclude is limited by laws mandating vaccinations and allowing forced surgeries in emergency situations. *Id.*

ty — namely the right to sell.²¹ However, as noted earlier, one need not possess all of the rights in the “bundle” in order to have property rights.²² Moreover, even though the common law disfavored restraints on alienation, this did not cause the property subject to such restraints to not be considered property.²³ Finally, the right to exclude others from one’s property, which is considered the most important right in the bundle of property rights, is generally present in relation to the human body, so that one can legitimately argue that property rights in the body do exist.²⁴

Although many courts have held that there is no property right in a dead body in a commercial sense,²⁵ some have held that the next of kin possess a “quasi-property right” in the remains.²⁶ Comment (a) to Section 868 of the Restatement of Torts provides that:

[T]he right of control over a dead body does not fit well into the category of property because a body cannot ordinarily be sold or transferred, has no utility, and can be used only for the purpose of internment or cremation.²⁷

However, the rationale of Comment (a) is not reasonable in the modern technological age. As noted earlier, the human body can be used for many purposes and is very valuable.

An issue related to the classification of a dead body as property is whether damage to the remains during shipment by an air carrier is covered under the Warsaw Convention.²⁸ Article Nine-

21. Jaffe, cited at note 2, at 551.

22. See *Brotherton v. Cleveland*, 923 F.2d 477, 481 (6th Cir. 1991).

23. See *Brotherton*, 923 F.2d at 481.

24. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

25. See *Snyder v. Holy Cross Hospital*, 352 A.2d 334, 340 (Md. 1976); see also *Glatzer v. Dinerman*, 59 A.2d 242, 243 (N.J. 1948) (holding that there is no right of property “in a strict sense or in the ordinary use of the term” to a dead body).

26. Some courts have held that there is a “quasi-property right” in a dead body, i.e., the right and duty to bury the dead. See *Toliver v. Odom*, 110 S.Ct. 159 (1989); *Lavant v. St. Joseph’s Hosp.*, 475 U.S. 1084 (1986); *Arnoud v. Odom*, 870 F.2d 304, 308 (5th Cir. 1989); *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984); *State v. Powell*, 497 So.2d 1188, 1191 (Fla. 1986), cert. denied 481 U.S. 1059 (1987); *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985); *Blanchard v. Brawley*, 75 So.2d 891, 893 (La. 1954); *Diebler v. American Radiator & Standard Sanitary Corp.*, 92 N.Y.S.2d 356, 358 (1949); *Everman v. Davis*, 561 N.E.2d 547 (Ohio 1989); *Carney v. Knollwood Cemetery Ass’n*, 514 N.E.2d 430, 435 (Ohio 1986) (noting that such a right has long been discredited and abandoned); *In re Estate of Moyer*, 577 P.2d 108, 110 n.5 (Utah 1978); *Sanford v. Ware*, 60 S.E.2d 10, 12 (Va. 1950); *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 440-41 (W. Va. 1985).

27. RESTATEMENT (SECOND) OF TORTS § 868 cmt. a (1979).

28. Article 1(1) of the Warsaw Convention provides that, “[t]his Convention

teen of the Warsaw Convention provides that the carrier is liable for any damage which results from delay during the transportation of "passengers, baggage or goods."²⁹ The courts which have addressed the issue of whether human remains qualify as "passengers, baggage or goods" have uniformly held that human remains were "goods" and were therefore covered by the Warsaw Convention.³⁰ Further, the legal interest of a spouse to the remains of the deceased spouse has been held to be more closely related to the property interest of an owner than to the right of a passenger to be free from personal injury.³¹ Such discussions indicate that the dead body has a character of property, because a dead body may be classified as goods, and goods are unquestionably considered property.

The next section demonstrates how one court reacted negatively to the concept of applying the property right of possession, to the human body and forestalled a conversion action based upon misappropriation and exploitation of a patient's cells.

SECTION III — CONVERSION OF THE BODY'S CELLS: *MOORE*

In *Moore v. Regents of the University of California*,³² the Supreme Court of California addressed the controversial issue of whether tissues that had been removed from a person's body constituted that person's property and were therefore subject to conversion.³³ In 1976, John Moore ("Moore") was treated at the UCLA Medical Center (the "Center") for hairy-cell leukemia.³⁴ Moore's doctor removed blood products from Moore's body and soon realized that these blood products contained substances which would be commercially and scientifically useful.³⁵ The doctor then informed Moore that the removal of his spleen was

shall apply to all international transportation of persons, baggage or goods performed by aircraft for hire." *Tarar v. Pakistan Int'l Airlines*, 554 F.Supp. 471, 478 (S.D. Tex. 1982) (quoting Warsaw Convention, Article 1(1)).

29. *Tarar*, 554 F.Supp. at 478 (citing Warsaw Convention).

30. See *Onyeausi v. Pan Am*, 952 F.2d 788, 793 (3d Cir. 1992); *Johnson v. American Airlines, Inc.*, 834 F.2d 721, 723 (9th Cir. 1987); *Blair v. Delta Airlines, Inc.*, 344 F.Supp 360, 365 (S.D. Fla. 1972), *aff'd* 477 F.2d 564 (5th Cir. 1973); *Millhizer v. Riddle Airlines, Inc.*, 185 F.Supp. 110, 113 (E.D. Mich. 1960), *aff'd*, 289 F.2d 933 (6th Cir. 1961) (holding that a box containing remains should be treated as "freight" because of the way it was handled). Although the *Tarar* court did not classify the remains as "goods," such a classification was not at issue because both parties agreed that the remains were not goods. See *Tarar*, 554 F. Supp. at 474.

31. See *Millhizer*, 185 F. Supp. at 113.

32. 793 P.2d 479 (Cal. 1990).

33. *Moore*, 793 P.2d at 479.

34. *Id.* at 481.

35. *Id.*

necessary both to slow the progress of the disease and save Moore's life.³⁶ The doctor and several others, however, actually planned to use Moore's spleen in research efforts.³⁷ No one informed Moore of the research activities nor did they request his permission to use the spleen for research purposes.³⁸ Moore returned to the Center several times between 1976 and 1983, at his doctor's insistence, to have more blood removed.³⁹ Eventually, the doctor formed a cell line from Moore's cells which the doctor patented in 1984.⁴⁰ The estimated value of the patent through 1990 was over three billion dollars.⁴¹

Moore subsequently filed suit, alleging that the doctor's actions constituted a conversion of Moore's property.⁴² The trial court dismissed Moore's claim on the grounds that he failed to state a cause of action for conversion.⁴³ The Court of Appeals disagreed and reversed the dismissal.⁴⁴ However, the Supreme Court of California rejected Moore's claim that he owned his cells, thereby forestalling a conversion action.⁴⁵ The court stated that in order to bring an action for conversion of one's cells, an individual had to retain some type of ownership interest in the cells.⁴⁶ The court held that because Moore could not have reasonably expected to retain possession of his cells after they were removed from his body, he could not bring an action for conversion.⁴⁷

The court gave three reasons why Moore did not retain an ownership interest in his cells.⁴⁸ First, the court asserted that no judicial decision supported Moore's claim.⁴⁹ Second, the court interpreted California statutory law regarding the disposal of human body parts after scientific use to severely limit any inter-

36. *Id.*

37. *Id.*

38. *Moore*, 793 P.2d at 481.

39. *Id.*

40. *Id.* at 482. The doctor patented the cell line with himself and another researcher as inventors and the regents as assignee of the patent. *Id.* The cell line was valuable because it enabled the cells to reproduce indefinitely. *Id.* at 482 n.2. The cells, called T-lymphocytes, were white blood cells which produced lymphokines or proteins that regulate the immune system and may have therapeutic value. *Id.* The researchers wanted to identify the genetic materials necessary to produce lymphokines in order to manufacture lymphokines using DNA. *Id.*

41. *Id.*

42. *Id.*

43. *Moore*, 793 P.2d at 482.

44. *Id.*

45. *Id.* at 488.

46. *Id.* at 489.

47. *Id.*

48. *Moore*, 793 P.2d at 489.

49. *Id.*

est of a patient in cells once they had been removed.⁵⁰ Third, the court concluded that the patented cell line and its products could not be Moore's property.⁵¹ The court based this conclusion on the fact that the patented cell line was "factually and legally distinct" from the cells removed from Moore's body.⁵² The court stated that Moore could not claim to own the cell line because the nature of the patent assured that the cell line was the product of invention.⁵³

The court asserted that the cause of action for conversion should not be extended to cover the use of excised human cells in medical research.⁵⁴ There were several policy considerations upon which the court based its decision. First, the court stressed the importance of protecting a patient's right to make independent medical decisions — a right grounded in the principles of fiduciary duty and informed consent.⁵⁵

The court also considered the effect of what it referred to as "disabling civil liability" on those engaged in useful activities.⁵⁶ For example, the court noted that researchers who were innocent and had no knowledge that their use of any particular cells was against a patient's wishes could be subject to endless litigation by patients who wanted to share in the researchers' profit.⁵⁷ In support of this contention, the court cited a Report to Congress by the Office of Technology Assessment, which provided:

50. *Id.* The California Health and Safety Code provides:

Notwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety.

CAL. HEALTH & SAFETY CODE § 7054.4 (West Supp. 1994). The *Moore* court noted that the practical effect of the statute was to limit a patient's control over removed cells by restricting how the cells could be used and by requiring their destruction. *Moore*, 793 P.2d at 492. The court asserted that the statute eliminated a sufficient number of property rights so that what remained could not be considered property which could be converted. *Id.*

51. *Moore*, 793 P.2d at 489.

52. *Id.* at 492.

53. *Id.* at 493.

54. *Id.* Justice Broussard noted that the facts support a cause of action for conversion under traditional common law and that there would be no need to "extend" existing common law principles to recognize a conversion action where the defendant obtained the plaintiffs' consent for removal of body parts by fraud. *Id.* at 503 n.4 (Broussard, J., concurring and dissenting). The majority, however, noted that the privacy issue raised by *Moore* had no place in the discussion because such privacy interests were protected by the fiduciary-duty and informed consent doctrines. *Moore*, 793 P.2d at 491.

55. *Id.* at 493.

56. *Moore*, 793 P.2d at 493.

57. *Id.*

Uncertainty about how courts will resolve disputes between specimen sources and specimen users could be detrimental to both academic researchers and the infant biotechnology industry, particularly when the rights are asserted long after the specimen was obtained. The assertion of rights by sources would affect not only the researcher who obtained the original specimen, but perhaps other researchers as well.⁵⁸

The report stressed the impact this might have on the entire industry: "companies are unlikely to invest heavily in developing, manufacturing or marketing a product when uncertainty about clear title exists."⁵⁹ The court explained that the extension of a cause of action for conversion into the area of human research would impede research by restricting access to raw materials⁶⁰ and would threaten to "destroy the economic incentive to conduct important medical research."⁶¹ The court concluded that a decision to recognize the tort of conversion for unauthorized use of excised cells was for the legislature to make.⁶²

Justice Arabian concurred in the decision but wrote separately to note his concerns about the immorality of commercializing the human body.⁶³ Justice Arabian stated that Moore wanted the court to "regard the human vessel — the single most venerated and protected subject in any civilized society — as equal with the basest commercial commodity."⁶⁴ He believed that the consequences of recognizing a property interest in the body could potentially include the establishment of "a marketplace of human body parts," competitive bidding for research materials and exposure of researchers to "potentially limitless and uncharted tort liability."⁶⁵

Justice Broussard concurred and dissented.⁶⁶ Justice Broussard concurred on the point that Moore had a cause of action for breach of fiduciary duty against his doctor,⁶⁷ but dissented on the point that there was no cause of action for conversion.⁶⁸ Broussard noted that when a patient consented to the use of a body part for research, its potential value could not be discovered

58. *Id.* (citing U.S. Congress Office of Technology Assessment, *New Developments in Biotechnology: Ownership of Human Tissues and Cells* (1987)).

59. *Moore*, 793 P.2d at 494.

60. *Id.*

61. *Id.* at 495.

62. *Id.* at 496.

63. *Id.* at 497 (Arabian, J., concurring).

64. *Moore*, 793 P.2d at 497 (Arabian, J., concurring).

65. *Id.* at 498.

66. *Id.* (Broussard, J., concurring and dissenting).

67. *Id.* at 499.

68. *Id.*

until much later, so that it would be difficult to set up a plan whereby a patient and a researcher could share profits.⁶⁹ Justice Broussard reasoned that because the majority was concerned with holding liable innocent researchers who used the "resources of existing cell repositories," it found that a person did not have property rights in a body part after it was removed.⁷⁰

However, Justice Broussard recognized an important distinction. In the present case, the defendants interfered with Moore's legal rights before the part was removed.⁷¹ If a patient consented to the removal and use of his body part, then he had no legal interest in the body part after its removal.⁷² However, before a part was removed, the patient alone had the right to determine how it would be used after it was removed.⁷³ Justice Broussard contended that if a doctor deceived a patient and interfered with that patient's right to control the use of the part, then the patient could bring a cause of action for conversion under common law and recover the economic value of the right to control the use of the part.⁷⁴ On the other hand, if the patient consented to the removal and use of the part for research and then it was later discovered that the part was valuable, then the patient would have no action for conversion because the patient had abandoned all rights to the part.⁷⁵

In this case, Moore did not consent to the removal of his spleen for research purposes; he only consented because he thought that the removal was medically necessary, having been so informed by his doctor. Therefore, applying Justice Broussard's reasoning, Moore should have been able to bring an action for conversion and recover the economic value of the right to control the use of the part.

Justice Broussard also noted in his dissent that the majority could not point to any authority, statutory or common law, which supported the proposition that a patient did not have the right, prior to removal of an organ, to decide how the organ should be used.⁷⁶ However, Justice Broussard referred to the Uniform Anatomical Gift Act (the "Act"), as enacted by California,⁷⁷ to

69. *Moore*, 793 P.2d at 499 (Broussard, J., concurring and dissenting).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Moore*, 793 P.2d at 499 (Broussard, J., concurring and dissenting).

75. *Id.* at 500.

76. *Id.* at 501.

77. CAL. HEALTH & SAFETY CODE §§ 7150 to 7156.5. (West 1970 & Supp. 1994).

demonstrate that the patient did have such a right.⁷⁸ Justice Broussard noted that although the Act did not apply to research and to living donors, it nevertheless demonstrated the state's policy "concerning an individual's authority to control the use of a donated body part."⁷⁹

Justice Broussard further noted that this same right of control of one's own body parts was also protected by the law of conversion.⁸⁰ In his opinion, conversion protected a person against all interference with his or her right of possession and right to property.⁸¹

Justice Mosk dissented, arguing that there would be "equitable sharing" if the courts recognized that people had a legally protected property interest in their own bodies and the products derived therefrom.⁸² The recognition of property rights in one's own body would achieve fairness and prevent unjust enrichment by giving compensation to the donor and the researcher in amounts equal to the value of their contributions.⁸³ Justice Mosk noted that there were monetary benefits available in human biotechnology, and to "deny the person contributing the raw materials a fair share of these ample benefits is both unfair and morally wrong."⁸⁴

The majority's reasoning in *Moore* is questionable. First, the court argued that no judicial decision supported Moore's claim.⁸⁵ However, as the dissenters noted, there were no judicial decisions rejecting such a claim because it was a case of first impression.⁸⁶ Justice Mosk, writing for the dissent, noted that "[t]he issue is as new as its source — the recent explosive growth in the commercialization of biotechnology."⁸⁷ Mosk further stated that if a cause of action was otherwise an appropriate remedy, a court should not refrain from finding such a cause of action merely because another court had not so held or the legislature had not

78. *Moore*, 793 P.2d at 501 (Broussard, J., concurring and dissenting).

79. *Id.*

80. *Id.* at 502.

81. *Id.*

82. *Id.* at 517 (Mosk, J., dissenting).

83. *Moore*, 793 P.2d at 517 (Mosk, J., dissenting) (citing Roy Hardiman, Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 U.C.L.A. L. REV. 207, 229 (1986)).

84. *Moore*, 793 P.2d at 517 (Mosk, J., dissenting) (citing Hardiman, cited at note 83, at 229-30).

85. *Moore*, 793 P.2d at 489.

86. *Id.* at 502 (Broussard, J., concurring and dissenting) (noting also that the Uniform Anatomical Gift Act gave the patient a right to designate before removal how the part would be used).

87. *Id.* at 507 (Mosk, J., dissenting).

addressed the issue.⁸⁸

The majority also interpreted California law to severely limit any interest of a patient in cells once they had been removed.⁸⁹ However, as Justice Broussard noted, the statute addressed the disposal of human body parts after scientific use and did not prohibit a patient from choosing among legally permissible uses for his or her body parts.⁹⁰ The statute also did not give a doctor any greater right than the patient in deciding how a body part would be used.⁹¹

The majority's third argument was that the patented cell line and its products could not be Moore's property.⁹² Again, the court's reasoning was faulty because the court ignored the fact that although Moore may not have been able to recover the value of the patent and its derivative products, Moore could still maintain a conversion action for the unauthorized use of the underlying body parts.⁹³ In other words, although Moore may not have had an ownership in the patented cell line, he was nevertheless entitled to compensation for the unauthorized use of his cells before the cell line was ever patented.⁹⁴

The majority's "disabling civil liability" policy argument was not persuasive because researchers could easily protect themselves from liability by using proper recordkeeping to retain the information needed, such as which tissues were taken from which persons.⁹⁵ The court argued that the extension of a cause of action for conversion into the area of human research would impede research by restricting access to raw materials⁹⁶ and would threaten to "destroy the economic incentive to conduct important medical research."⁹⁷ These policy reasons may be applicable to situations when a researcher obtains cells from an already existing cell bank. However, these policy reasons do not

88. *Id.*

89. *Id.* at 489.

90. *Moore*, 793 P.2d at 503 (Broussard, J., concurring and dissenting).

91. *Id.*

92. *Id.* at 489.

93. *Id.* at 503 (Broussard, J., concurring and dissenting).

94. *Id.* at 511 (Mosk, J., dissenting). Justice Mosk discussed the relative contributions of each party:

I do not question that the cell line is primarily the product of defendant's inventive effort. Yet likewise no one can question Moore's crucial contribution to the invention—an invention named, ironically after him [the Mo cell line]; but for the cells of Moore's body taken by defendants, there would have been no Mo cell line.

Id.

95. *Moore*, 793 P.2d at 515 (Mosk, J., dissenting).

96. *Id.* at 494.

97. *Id.* at 495.

apply to situations, such as the present one, where use of the cells was unauthorized and obtained by fraud.⁹⁸ One dissenting justice contended that there was no reason to believe that applying conversion law to such a situation would have a "negative effect on the primary conduct of medical researchers who use tissue and cell banks."⁹⁹

Moreover, several policy considerations in favor of a cause of action for the conversion of human tissues outweigh those proposed by the majority. The first is the policy that each person has a "legally protectible property interest in his own body and its products."¹⁰⁰ Next is the fundamental equitable principle of unjust enrichment. Research should not result in considerable economic gain for the researcher and none for the patient who enables the research. As one dissenting justice noted, notions of fundamental fairness abhors the unjust enrichment of one at the expense of another, particularly where the two are not in equal bargaining positions.¹⁰¹

Justice Arabian's concurrence misinterprets the majority's holding to mean that body parts could never be bought and sold for research. However, as noted by a dissenter, the majority's holding did not mean that body parts could not be bought and sold for research or commercial use, or that no one could benefit commercially from the value of a patient's cells.¹⁰² The holding simply prevented Moore from obtaining the benefit of his own cells' value, while allowing the defendants, whose conduct was improper and unethical, to "retain and exploit the full economic value of their ill-gotten gains free of their ordinary common law liability for conversion."¹⁰³

Moore demonstrates how blind adherence to tradition and ignorance in the face of fear of development and advancement can hinder the proper evolution of the law. The law is not rigid and is capable of growth and adaption to change.¹⁰⁴ The courts should not refrain from recognizing a right simply because such a right was not traditionally recognized. In the past, there was no need to recognize a property right in the body because body parts were not as commercially and medically useful as they are today. However, where there was such a need, such as in the "quasi-

98. *Id.* at 504 (Broussard, J., concurring and dissenting).

99. *Id.* at 504-05.

100. *Moore*, 793 P.2d at 515 (Mosk, J., dissenting).

101. *Id.* at 516.

102. *Id.* at 506 (Broussard, J., concurring and dissenting).

103. *Id.*

104. *Id.* at 507 (Mosk, J., dissenting).

property rights" in a dead body, rights have always been recognized to the extent necessary.¹⁰⁵

SECTION IV — THE URGENT NEED FOR ORGANS FOR TRANSPLANTATION

In addition to preventing the abuses demonstrated in *Moore*, recognition of property rights in the body are necessary to encourage organ donation. Technology has enabled organ transplantations to become extremely effective and has created an extreme shortage in organs donated for use in transplantation.¹⁰⁶ The supply of donated organs has not kept up with the increasing demand.¹⁰⁷ This organ shortage is inconsistent with the results of public opinion polls that indicate that there is overwhelming support for organ donation¹⁰⁸ and with the fact that there are more than enough potential organ donors to provide organs for all of the necessary transplants.¹⁰⁹

105. See notes 25-28 and accompanying text for a discussion of the "quasi-property" rights in a dead body.

106. James Williams, *Need For Organs Greater Than Supply*, CHI. TRIB., April 19, 1993, (Perspective), at 14.

107. Roger W. Evans, *Organ Procurement Expenditures and the Role of Financial Incentives*, 269 JAMA 3113, 3113 (1993). The number of people awaiting a transplant rose from 9,632 in 1986 to 31,333 in 1993. *Id.* at 3114. However, the number of cadaveric donors only rose from 3,990 to 4,549 in the same time period. *Id.* According to Michael Evanisko, president of the Partnership for Organ Donation, there are currently over 30,000 people on waiting lists for organs, and every day, seven of those people die waiting for an organ. *Body Talk*, S.F. CHRON., Feb. 21, 1994, at E9. See George D. Lundberg, *Attitudes Toward Autopsy and Organ Donation in Sweden and the U.S.*, 271 JAMA 317, 317 (1994).

108. Teri Randall, *Too Few Human Organs for Transplantation, Too Many in Need . . . and the Gap Widens*, 265 JAMA 1223, 1223 (1991). A 1990 Gallup poll indicated that 85% of those polled favored donating the organ of a loved one and 60% of those polled indicated that they would donate their own organs. *Id.* However, the true numbers are inconsistent with these results. *Id.* For the estimated 15,000 eligible organ donors who die each year, only 25-30% of the families consent to donation. *Id.* A 1994 Gallup poll indicated that 9 out of 10 Americans support organ donation. *Body Talk*, cited at note 107.

109. *Id.* One author noted that one healthy cadaver could provide the following:

- 2 corneas to help restore sight;
- 2 each of the inner ear, the hammer, anvil, stirrup, to ameliorate some forms of deafness;
- 1 jaw bone used in facial reconstruction;
- 1 heart;
- 1 heart pericardium (the sac that surrounds the heart is made of tough tissue that can be used to cover the brain after surgery);
- 4 separate heart valves;
- 2 lungs;
- 1 liver;
- 2 kidneys;
- 1 pancreas, which when transplanted can restore insulin produc-

Organs for transplantation are obtained by organ procurement organizations ("OPOs") which charge hospitals for the procurement of donor organs.¹¹⁰ The hospitals then mark up these charges and pass them on to organ transplant recipients.¹¹¹ A single multi-organ donor can save many lives and generate revenue for the OPOs and hospitals because each recipient is billed separately for each organ.¹¹² This system is financially lucrative to both hospitals and OPOs.¹¹³

Those who oppose compensation for organs argue that financial incentives would add to total transplant costs, making transplants more expensive and benefiting only the rich who could afford the costs of transplants.¹¹⁴ However, opponents either ignore or fail to recognize the fact that there are already financial incentives inherent in organ transplantation.¹¹⁵ Implicit financial incentives are "misdirected" to OPO's instead of to donors or

tion in diabetics;

1 stomach (stomachs have been transplanted experimentally without much success);

206 separate bones, including long bones of the arms and legs for use in limb reconstruction and ribs used in spinal fusion and facial repair;

2 hip joints;

about 27 ligaments and cartilages used in rebuilding ankles, knees, hips, elbows and shoulder joints;

approximately 20 square feet of skin, which can be used as a temporary covering for burn injuries;

over 60,000 miles of blood vessels, mostly veins that can be transplanted to reroute blood around blockages;

nearly 90 ounces of bone marrow to treat leukemia and a variety of other diseases.

KIMBRELL, cited at note 5, at 28 (citing *Re-usable Body Parts*, WASH. POST, May 28, 1991, Health).

110. Evans, cited at note 107, at 3114. These charges to the hospital are referred to as "standard acquisition fees." *Id.*

111. *Id.*

112. *Id.* at 3116. The following are ranges of organ procurement charges for 1988 (charges include transportation costs):

Transplant Procedure	Minimum Charge	Maximum Charge
Kidney	\$682	\$87,629
Heart	\$390	\$60,000
Liver	\$4,775	\$65,652
Heart-lung	\$5,149	\$38,000
Pancreas	\$585	\$32,952

Id.

113. *Id.*

114. *Id.*

115. Evans, cited at note 107, at 3116.

their families.¹¹⁶ Some propose that a portion of these funds be set aside for the families of donors.¹¹⁷ Most health care professionals, however, are reluctant to endorse financial incentives.¹¹⁸ Although compensation for organs would encourage donation, the transplant community opposes such compensation because it would "tarnish the field and introduce a host of ethical problems."¹¹⁹ However, some question the fairness of a system which offers no compensation to the families who give "the gift of life."¹²⁰

SECTION V — SALE OF BLOOD, SPERM AND HAIR

While society shuns the idea of selling body organs, it has accepted the sale of blood, sperm, hair and other renewable bodily fluids and tissues.¹²¹ There are more than four hundred blood centers in the United States that collect, buy and market blood products.¹²² The United States is the world leader in exporting blood, which constitutes a two billion dollar industry.¹²³ There has been some conflict as to whether providing blood is a sale or a service.¹²⁴ However, this controversy arose primarily because

116. *Id.* at 3117.

117. *Id.* A National Kidney Foundation survey revealed that 65% of 18-24 year-olds favor financial incentives. *Id.*

118. *Id.*

119. Teri Randall & Charles Marwick, *Physicians' Attitudes and Approaches Are Pivotal in Procuring Organs for Transplantation*, 265 JAMA 1227, 1228 (1991).

120. Randall & Marwick, cited at note 119, at 1228.

121. *See Onyeausi*, 952 F.2d at 792 (acknowledging the legality of the sale of blood and sperm).

122. KIMBRELL, cited at note 5, at 20.

123. *Id.* at 21.

124. *See Whitehurst v. American Nat'l Red Cross*, 402 P.2d 584 (Ariz. Ct. App. 1965) (holding that a transfer of blood was not a sale); *Shepard v. Alexian Brothers Hosp., Inc.*, 109 Cal. Rptr. 2d 132, 134 (Cal. Ct. App. 1973) (holding that a blood transfusion was a service, not a sale, and therefore, strict liability for contamination of the blood was inapplicable as a matter of law); *White v. Sarasota County Public Hosp. Bd.*, 206 So.2d 19 (Fla. 1968) (holding that blood transferred from a hospital to a patient constituted a service rather than a sale); *Community Blood Bank, Inc. v. Russell*, 196 So.2d 115 (Fla. 1967) (holding that a transfer of blood from a commercial blood bank to a patient for consideration constituted a sale and the patient could bring an action for breach of warranty against the blood bank); *Balkowitsch v. Minneapolis War Memorial Blood Bank*, 132 N.W.2d 805 (Minn. 1965) (holding that a transfer between a noncommercial blood bank and a hospital was not a sale because a non-profit corporation could not be characterized as a commercial business which offered products for sale); *Carter v. Inter-Faith Hosp. of Queens*, 304 N.Y.S.2d 97, 100 (1969) (holding that the supplying of blood by blood bank to a hospital was a sale, allowing for an action against the blood bank for negligence and breach of warranty of merchantability due to the patient's contracting serum hepatitis from the blood). *See also United States v. Garber*, 589 F.2d 843, 848 (5th Cir. 1979) (holding that the proceeds from the sale of blood plasma constituted taxable income).

of the liability attached to the provision of contaminated blood.¹²⁵ Therefore, one should not conclude from the classification of a blood donation as a service that blood is not to be considered property.¹²⁶ However, many have argued that the sale of blood was "just the beginning of the slippery slope toward the commodification of the body."¹²⁷

The issue of whether a man has property rights in his sperm was addressed in the California case of *Hecht v. Superior Court of California*.¹²⁸ In *Hecht*, the decedent had deposited sperm in a sperm bank.¹²⁹ In his will, he devised the frozen sperm to his girlfriend.¹³⁰ His will provided that it was his intention that the samples of his sperm would be stored at the sperm bank "for the use of Deborah Ellen Hecht, should she so desire."¹³¹ The plaintiff, Deborah Ellen Hecht, argued that the estate had no property interest or right in the sperm because it was gifted to her when it was deposited in the bank.¹³² She argued that even if the sperm was found to be an asset of the estate, it should be distributed to her because there was an agreement that entitled her to sole possession and control of the sperm and because the will specifically provided that she was to be the sole beneficiary of the sperm.¹³³

The court, in deciding whether the sperm could be part of the estate, examined the interest that the decedent had in his sperm once he deposited it in the bank.¹³⁴ The court noted that the decedent had contracted with the sperm bank and had the intention and expectation of remaining in control of the sperm after depositing it in the bank.¹³⁵ The court asserted that if a person simply donated sperm to be used by the bank, then he waived any rights which he had in the sperm; however, if a person deposited sperm for his own future use, then he continued to own

125. See *Moore*, 793 P.2d at 518 (Mosk, J., dissenting).

126. Jaffe, cited at note 2, at 544 n.76.

127. KIMBRELL, cited at note 5, at 23.

128. 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

129. *Hecht*, 20 Cal. Rptr. 2d at 276.

130. *Id.*

131. *Id.*

132. *Id.* at 279. The plaintiff claimed that it was a gift inter vivos, because the decedent signed a provision authorizing the release of any specimens to the plaintiff or her doctor. *Id.* The plaintiff also claimed that it could have been a gift causa mortis because only one month after he made the deposit and signed the authorization, the decedent committed suicide. *Id.* The estate wanted the sperm destroyed in order to protect the interests of the decedent's two children by marriage. *Id.*

133. *Id.*

134. *Hecht*, 20 Cal. Rptr. 2d at 281.

135. *Id.*

the sperm.¹³⁶ The court reasoned that at the time of his death, the decedent had an interest in the nature of ownership in his sperm, because he retained authority over its disposition.¹³⁷ Because his interest in the sperm was considered property within the definition of the Probate Code,¹³⁸ the court held that the sperm was part of the decedent's estate and should be distributed to the plaintiff.¹³⁹

Hecht may be contrasted with the Tennessee Supreme Court case of *Davis v. Davis*.¹⁴⁰ In *Davis*, the controversy was over the disposition of frozen pre-embryos in a divorce proceeding.¹⁴¹ The court refused to characterize the parties' interest in the pre-embryos as a property interest under general property law.¹⁴² However, the court noted that the parties did have an interest "in the nature of ownership" to the extent that they had decisionmaking authority concerning the disposition of the pre-embryos.¹⁴³

Using the same "decisionmaking authority" standard, the *Hecht* court found that a property right existed, while the *Davis* court did not. This could simply be due to the fact that property rights in another human being, even one's own child, is morally abhorrent, and property rights in a pre-embryo is one step closer to that reality than property rights in sperm.

The Maryland Supreme Court case of *Venner v. State*¹⁴⁴ examined the property rights in human waste. In *Venner*, the defendant was taken to a hospital emergency room because he was suffering from nausea, dizziness, weakness, disorientation and hallucinations.¹⁴⁵ While at the hospital, the defendant passed several balloons filled with hashish oil which he had swallowed in an attempt to smuggle the drugs into the country.¹⁴⁶ The hospital gave the balloons to the police, and the defendant alleged an unlawful, warrantless search and seizure.¹⁴⁷ The issue was whether the defendant had any rights to his waste after it

136. *Id.* at 282.

137. *Id.* at 281.

138. The California Probate Code defines property as "anything that may be the subject of ownership and includes both real and personal property and any interest therein." CAL. PROB. CODE § 62 (West 1991).

139. *Hecht*, 20 Cal. Rptr. 2d at 283.

140. 842 S.W.2d 588 (Tenn. 1992).

141. *Davis*, 842 S.W.2d at 589.

142. *Id.* at 597.

143. *Id.*

144. 354 A.2d 483 (Md. 1976).

145. *Venner*, 354 A.2d at 487.

146. *Id.*

147. *Id.*

passed from his body.¹⁴⁸

The *Venner* court noted that waste was universally considered abandoned.¹⁴⁹ If a person failed to indicate an intention to assert ownership, possession or control, the presumption was that one intended to abandon the property.¹⁵⁰ Also, if one allowed waste to enter into the stream of disposal, then one abandoned any legal rights to the waste.¹⁵¹ This discussion indicates that one can, if one desires, assert an ownership and possessory right over one's waste. In fact, the court noted that it was not unusual for someone to assert a continuing right of ownership, dominion or control over excrement, fluid waste, secretions, hair, nails, blood, organs and other parts of the body, whether separation from the body was intentional, accidental, or the result of normal bodily functions.¹⁵² Therefore, the court ruled that a person had property rights in wastes or materials which were part of the body until the waste or materials were normally discarded after separation from the body.¹⁵³

SECTION VI — STATUTORY LAW RELATING TO THE SALE OF ORGANS

Various state and federal laws address the issue of compensation for body parts and organs. Some of these statutes only prohibit the sale of organs for transplantation purposes¹⁵⁴ and others prohibit any type of sale for any purpose.¹⁵⁵ Arkansas prohibits the purchase or sale of a body part for transplantation or therapy, if the removal is intended to occur after death.¹⁵⁶ Arkansas also prohibits the purchase or sale of fetal remains resulting from an abortion.¹⁵⁷ Minnesota prohibits the purchase or sale of a living human conceptus or nonrenewable organ, but

148. *Id.* at 498-99.

149. *Id.*

150. *Venner*, 354 A.2d at 499.

151. *Id.*

152. *Id.* at 498.

153. *Id.*

154. See LA. REV. STAT. ANN. § 41:101.1 (West Supp. 1994); N.Y. PUB. HEALTH LAW § 4307 (McKinney 1985); W. VA. CODE § 16-19-7a (1991); WIS. STAT. § 146.345 (1989).

155. See FLA. STAT. ch. 873.01 (Supp. 1994); FLA. STAT. ch. 873.05 (Supp. 1994) (also prohibiting sale of human embryos); MD. CODE ANN., HEALTH-GEN. § 5-408(a) (1990); TEX. PENAL CODE ANN. § 48.02 (West 1994).

156. ARK. CODE ANN. § 20-17-610 (Michie 1991).

157. ARK. CODE ANN. § 20-17-802(c). The statute provides, "[n]o person shall buy, sell, give, exchange, or barter or offer to buy, sell, give, exchange, or barter any fetus born dead as a result of a legal abortion or any organ, member, or tissue of fetal material resulting from a legal abortion." *Id.*

allows the purchase or sale of cell culture lines or lines taken from nonliving human conceptus.¹⁵⁸ California criminalizes the purchase or sale of organs for the purpose of transplantation, but exempts the donor, donee, and the next of kin who assist in obtaining the organ from the penalties.¹⁵⁹ Georgia prohibits the purchase and sale of organs but allows the purchase or sale of human tissue, organs or other body parts for health science education.¹⁶⁰

Although these statutes prohibit compensation for the organs, reasonable payments may be made for removal, transportation, preservation, implantation and storage costs for the organ and for travel expenses, housing, and lost wages for the donor.¹⁶¹ Statutes that prohibit only the sale of organs for transplantation or therapy do not expressly exclude the sale of organs for research and education.¹⁶² The rationale behind these statutes are highly questionable. As noted by the Court of Appeals for the Third Circuit, laws which prohibit organ and tissue sales are founded on moral and ethical rather than economic considerations.¹⁶³ The very presence of these laws, however, indicates that there would be a market for human remains in the absence of governmental intervention.¹⁶⁴

Congress has also enacted legislation which limits the sale of tissues and organs. For example, the National Organ Transplant Act¹⁶⁵ expressly prohibits the purchasing of organs for transplantation.¹⁶⁶ While not expressly allowing or prohibiting the sale of organs for transplantation purposes, the Uniform Anatom-

158. MINN. STAT. § 145.422 (1989). A "conceptus" is defined as, "the product of conception in the womb, especially in the early stages of pregnancy." THE NEW SHORTER OXFORD ENGLISH DICTIONARY 467 (1993).

159. CAL. PENAL CODE § 367f (West 1988).

160. GA. CODE ANN. § 16-12-160 (1992).

161. See ARK. CODE ANN. § 20-17-610(b) (Michie 1991); CAL. PENAL CODE § 367f(c)(2) (West 1988); FLA. STAT. ch. 873.01(3)(b) (Supp. 1994); GA. CODE ANN. § 16-12-160(b)(6) (1992); LA. REV. STAT. ANN. § 41:101.1(2) (West Supp. 1994); MINN. STAT. § 145.422(3) (1989); N.Y. PUB. HEALTH LAW § 4307 (McKinney 1985); TEX. PENAL CODE ANN. § 48.02(c) (West 1994); W. VA. CODE § 16-19-7a (1991); WIS. STAT. § 146.345(c) (1989).

162. See Jaffe, cited at note 2, at 544 n.75. One author notes that in practice, scientists often buy and sell human tissues. *Id.*

163. *Onyeausi*, 952 F.2d at 792.

164. *Id.*

165. 42 U.S.C. §§ 273-274 (1991). See also KIMBRELL, cited at note 5, at 30-31 (discussing the National Organ Transplant Act).

166. The National Organ Transplant Act provides, in pertinent part that, "[i]t shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." 42 U.S.C. § 274e(a) (1991).

ical Gift Act (the "UAGA")¹⁶⁷ was created to increase the supply of organ donors.¹⁶⁸ All fifty states and the District of Columbia have adopted the UAGA or some variation.¹⁶⁹ The concept of the UAGA is that a person is encouraged to donate his or her own organs. It seems illogical that one can donate or give away an organ when that person has no property interest in the organ.¹⁷⁰ Hence, the Supreme Court of Utah has noted that, by enacting the UAGA, the legislature has recognized that people have property rights in their body and can dispose of their organs.¹⁷¹ Similarly, the Sixth Circuit noted that the UAGA, as adopted by Ohio, designated a person who had the power to dispose of the decedent's body and could donate organs and tissues for research or transplants; the court found that the UAGA gave this designated person a possessory right in the decedent's body.¹⁷² Finally, Justice Mosk of the Supreme Court of California, in *Moore*, opined that it was not true that human organs and blood could not be legally sold.¹⁷³ Mosk asserted that the UAGA implied that it was legal to sell organs to biotech companies for research purposes.¹⁷⁴

SECTION VII — THE BODY AS PART OF THE ESTATE

While a person may not sell his body or its parts after death, there is an issue as to whether he can control the disposition of his own body by will. Historically, under English common law, a person had no property right in his own body and could not provide for the disposition of his body by will after death.¹⁷⁵ However, this was because all matters concerning the dead were subject only to the jurisdiction of the ecclesiastical courts.¹⁷⁶ A number of American courts have also held that the body of the decedent formed no part of the estate,¹⁷⁷ that the laws relating to descent of property were not intended to relate to the body of

167. UNIF. ANATOMICAL GIFT ACT § 7, 8A U.L.A. 29 (1993).

168. Jaffe, cited at note 2, at 529.

169. *Id.*

170. *See State v. Powell*, 497 So.2d 1188, 1198 (Fla. 1986) (Shaw, J., dissenting).

171. *Estate of Moyer*, 577 P.2d 108, 110 n.4 (Utah 1978).

172. *Brotherton*, 923 F.2d at 482.

173. *Moore*, 793 P.2d at 518 (Mosk, J., dissenting).

174. *Id.*

175. *Brotherton*, 923 F.2d at 481 (citing *Williams v. Williams*, 20 Ch.D. 659, 665 (1882)).

176. *Brotherton*, 923 F.2d at 481.

177. *See Moyer*, 577 P.2d at 110; *Fischer's Estate v. Fischer*, 117 N.E.2d 855, 859 (Ill. 1954); *Snyder v. Holy Cross Hospital*, 352 A.2d 334, 340 (Md. 1976).

the decedent,¹⁷⁸ and that the probate court did not even have jurisdiction over a controversy concerning a human body.¹⁷⁹

There is also a view that the wishes of the decedent concerning the disposition of his body should be considered by the probate court.¹⁸⁰ Furthermore, it has been argued that the UAGA authorizes an individual to direct the post mortem disposition of his body.¹⁸¹ Many state legislatures, through the UAGA, have recognized the right to devise one's own body after death.¹⁸² For example, Maryland expressly provides for the disposition of a body by will.¹⁸³ The fact that a body may be disposed of by will necessarily indicates that a property right exists — one cannot devise what one does not own.

SECTION VIII — PROPERTY RIGHTS IN THE BODY AND THE CONSTITUTION

While property rights in the body may not be recognized statutorily, there are constitutionally protected property rights in the body. Several cases have related the issue of property rights in the body with constitutionally protected rights. In *Fuller v. Marx*¹⁸⁴ the plaintiff's husband died while in prison.¹⁸⁵ The medical examiner performed an autopsy and concluded that the decedent died of heart failure.¹⁸⁶ The examiner returned the body to the family and separately disposed of the organs that he had removed for examination.¹⁸⁷ The plaintiff alleged that the

178. *Moyer*, 577 P.2d at 110.

179. *Fischer's Estate*, 117 N.E.2d at 859.

180. *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 440 (W. Va. 1985).

181. See Jaffe, cited at note 2, at 543. Section 2 of the UAGA provides, in pertinent part:

(e) An anatomical gift by will takes effect upon death of the testator, whether or not the will is probated. If, after death, the will is declared invalid for testamentary purposes, the validity of the anatomical gift is unaffected.

(g) The donor of an anatomical gift by will may amend or revoke the gift in the manner provided for amendment or revocation of wills

UNIF. ANATOMICAL GIFT ACT § 2, 8A U.L.A. 33 (1993).

182. See Hardiman, cited at note 83, at 226.

183. See MD. CODE ANN., HEALTH-GEN. § 5-408.1 (1994). This section provides that, "this subtitle does not deny the right of a donor to provide by last will and testament or by contract for the ultimate disposition and repose of the donor's last remains." *Id.*

184. 724 F.2d 717 (8th Cir. 1984).

185. *Fuller*, 724 F.2d at 718.

186. *Id.*

187. *Id.* One year after the first autopsy, the body was exhumed and a second autopsy was performed. *Id.* The second autopsy revealed that the cause of death was strangulation. *Id.* An investigation revealed that the decedent died after "horseplay"

medical examiner disposed of the decedent's organs in violation of the plaintiff's constitutional rights.¹⁸⁸ Specifically, the plaintiff argued that she had a property right in the decedent's body, and that she had a First Amendment right to bury the body according to her religious beliefs.¹⁸⁹

The court noted that the plaintiff had a quasi-property right in the decedent's body because she had a right as next of kin to bury it.¹⁹⁰ The court found it unnecessary to address the plaintiff's constitutional claim because it noted that the plaintiff could have obtained the organs by making a written request for them.¹⁹¹

While *Fuller* dealt with a constitutionally protected property right in the body, another case addressed the issue of due process. The Due Process and Equal Protection Clauses were implicated in *Brotherton v. Cleveland*.¹⁹² In *Brotherton*, the plaintiff was asked to make an "anatomical gift" on behalf of her deceased husband.¹⁹³ She declined and her refusal was noted in the hospital records.¹⁹⁴ Because the plaintiff's husband's death was considered a possible suicide, the coroner performed an autopsy.¹⁹⁵ After the autopsy, the decedent's corneas were removed pursuant to an Ohio statute¹⁹⁶ which permits a coroner to re-

with a guard in which the guard held the decedent in a headlock. *Id.* The plaintiff alleged negligence and that the medical examiner intentionally misstated the cause of death in order to cover up the incident with the guard. *Id.* at 719.

188. *Id.*

189. *Id.*

190. *Fuller*, 724 F.2d at 719.

191. *Id.* The court stated:

Any quasi-property rights Mrs. Fuller had in her husband's internal organs, if protected by the Constitution, were also protected by the Arkansas statute. Mrs. Fuller could have assured the return of the organs by complying with the Arkansas law Thus, we find no unconstitutional invasion of any property rights.

Id.

192. 923 F.2d 477 (6th Cir. 1991).

193. *Brotherton*, 923 F.2d at 478.

194. *Id.*

195. *Id.*

196. See OHIO REV. CODE ANN. § 2108.60(B) (Anderson 1994). Section 2108.60(B) provides:

(B) A county coroner who performs an autopsy, pursuant to section 313.13 of the Revised Code, may remove one or both corneas of the decedent . . . if all of the following apply:

(4) The coroner, at the time he removes or authorizes the removal of the corneas, has no knowledge of an objection to the removal by any of the following:

- (a) The decedent, as evidenced in a written document executed during his lifetime;
- (b) The decedent's spouse;

move the corneas of decedents without consent if the coroner has no knowledge of objections from the family.¹⁹⁷ In the present case, the hospital did not inform the coroner of the plaintiff's objections.¹⁹⁸ The plaintiff had no knowledge of the removal of the corneas until she read the autopsy report.¹⁹⁹ She and her children brought a section 1983 action²⁰⁰ alleging that the decedent's corneas were removed without due process of law and in violation of the Equal Protection Clause.²⁰¹ The district court dismissed the action, holding that the plaintiff failed to state a cognizable claim under section 1983.²⁰² The court of appeals reversed, holding that the plaintiff had a sufficient property interest in the decedent's corneas and that the removal of the corneas was caused by state action.²⁰³

The court found that in order to assert a valid due process claim, the plaintiff had to prove "(1) deprivation, (2) of property, (3) under color of state law."²⁰⁴ The court noted that a property interest which was protected by the due process clause had to be more than "abstract desires or attractions to a benefit."²⁰⁵ The due process clause only protected "interests to which one has a 'legitimate claim of entitlement.'"²⁰⁶ The court examined the traditional quasi-property rights in dead bodies and concluded that the rights which were granted to a surviving spouse rose to the level of a "legitimate claim of entitlement" in a spouse's

(c) If there is no spouse, the decedent's adult children

Id.

197. *Brotherton*, 923 F.2d at 478.

198. *Id.*

199. *Id.*

200. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress.

42 U.S.C. § 1983 (1988).

201. *Brotherton*, 923 F.2d at 478-79. The plaintiff also asserted pendent state law claims for emotional distress. *Id.* at 479.

202. *Id.* The court found that the plaintiff's due process claim failed because she did not have a property interest in the decedent's body. *Id.* The court also found that the plaintiff's equal protection claim, grounded on the fact that the statute only provided for removal of corneas from those autopsied, failed because there was no fundamental right or suspect class at issue. *Id.* The court found that the statute was rationally related to Ohio's interest in promoting the organ donation program. *Id.*

203. *Id.* at 478.

204. *Id.* at 479.

205. *Id.* at 480 (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

206. *Brotherton*, 923 F.2d at 480.

body.²⁰⁷ Therefore, the court found that the plaintiff did have a property right in the decedent's body which was protected by the due process clause of the Fourteenth Amendment.²⁰⁸ The court concluded that the removal of the corneas was achieved through state policy and custom and therefore the removal was a violation of the due process clause.²⁰⁹

SECTION IX — ARGUMENTS FOR AND AGAINST COMPENSATION

While the preceding sections addressed various specific instances in which property rights in the body were or were not recognized, this section deals with the general overall arguments for and against compensation for organs. The issue of compensation for tissues and organs for research and transplantation purposes elicits strong emotions from all involved. The arguments against compensation are primarily ethical, while the arguments for compensation are founded on equitable principles.

Opponents of compensation argue that compensation for organs is morally reprehensible and that such a scheme would prey on the vulnerable, such as the poor and uneducated.²¹⁰ Such opponents of compensation fear that "[p]oor people and the Third World could end up being used as organ farms for the wealthy."²¹¹ In a similar vein, opponents point to developing countries, such as India, where trafficking in human body parts is a booming industry and where corruption and abuses run rampant.²¹² The reason for such deplorable conditions, however, is the absence of laws regulating or controlling the sale of body organs or parts.²¹³ One could argue that such conditions would not exist in a more developed country such as the United States where the buying and selling of organs would be closely regulated and monitored.

Other arguments against compensation are that it would result in a decrease in the number of charitably donated organs and an increase in the number of inferior organs, create competitive bidding among recipients, and result in people risking death just to get money.²¹⁴ However, most of these arguments are not real-

207. *Id.* at 480, 482.

208. *Id.* at 482.

209. *Id.*

210. See Hardiman, cited at note 83, at 237.

211. *Body Organ Sales Discussed as a Way to Increase Supply*, L.A. TIMES, Sept. 24, 1991, at A4.

212. RENEE C. FOX & JUDITH P. SWAZEY, SPARE PARTS: ORGAN REPLACEMENT IN AMERICAN SOCIETY 68 (1992).

213. FOX & SWAZEY, cited at note 212, at 68.

214. See Hardiman, cited at note 83, at 237.

istic or could easily be remedied by developing a proper system of compensation. For example, the disadvantage to the poor would not occur because a compensation system would work the same as the present charitable donation system, where donated organs ordinarily do not go to a specified person. In other words, a person would not be selling an organ to a particular person, but rather to an organ bank which would then place it with a recipient based on need and compatibility.²¹⁵

The competitive bidding argument also is not realistic because of basic economic principles. If the supply of organs for donation increased, the need for competitive bidding would decrease.²¹⁶ The argument that people would conceal defects in order to get money for their organs is also meritless because organs will continue to be screened for diseases and defects before they are accepted. The fact that compensation may be given to the donor will not change the screening process.

The reasons to allow compensation for organs and tissues outweigh the arguments against it. Proponents contend that compensation for organ and tissue donation promotes autonomy and self-determination.²¹⁷ It also promotes the public well-being because it results in an increase in the availability and supply of tissues and organs.²¹⁸ It would negate the perception that the medical community is out to make a profit from the public's organs and tissues, and restore trust in the medical field because people would believe that they were being treated fairly.²¹⁹

The most compelling reason to allow compensation is to prevent unjust enrichment.²²⁰ Equity provides for many remedies not available at law, and in the context of compensation for organs, the application of equitable principles is long overdue. Researchers and hospitals have been profiting at the expense of patients and their families. Equity demands that some of the profit be diverted to the patient or his family, the ones who make

215. See Thomas G. Peters, *Life or Death: The Issue of Payment in Cadaveric Organ Donation*, 265 JAMA 1302, 1303 (1991).

216. See Hardiman, cited at note 83, at 237-38.

217. *Id.* at 235. One advocate of treating the body as one's own personal property that may be sold stated:

Such an approach is helpful, rather than harmful, to people's well-being. It offers potential psychological, physical, and economic benefits to individuals and provides a framework for handling evolving issues regarding the control of extracorporeal biological materials.

FOX & SWAZEY, cited at note 212, at 71 (citing L.B. Andrews, *My Body, My Property*, HASTINGS CENT. REP., Oct. 16, 1986, at 28, 37).

218. Hardiman, cited at note 83, at 235.

219. *Id.* at 237-38.

220. See Moore, 793 P.2d at 516 (Mosk, J., dissenting).

such valuable and necessary contributions.

SECTION X — PROPOSALS

There are many ways to allow compensation for donated organs or tissues. However, one must balance the need for just compensation with the need for morality. As noted earlier, the issue is a highly emotional one and those on both sides find compromise difficult. It is obvious that a compromise must be reached which allows compensation without offending the moral values of society. In reality, the compromise may simply be a game of semantics. The terminology used to classify the transaction may take some of the sting out of the nature of the compensation. For example, "financial incentives for donating organs" does not connote the harshness or commerciality of "payment for organs." It is also more "acceptable" to derive some sort of indirect benefit, such as an insurance or tax credit, than to be directly paid for donation.

If there is only research involved, then the debate does not seem as intense. If a profit is being made, it seems fair to allow the donee to share in the profit to the extent that he has contributed to it. Proposals in this area are legislative in nature. A licensing scheme could be enacted which establishes a fixed rate of profit sharing between the researcher and the subject.²²¹

However, proposals regarding compensation for organs to be used in transplantation are more controversial. Some proposals are based on the theory of a credit or stipend. One proposed plan would allow a payment toward health insurance in exchange for donated organs or tissues or for promises to donate organs when one dies.²²² A variation of this proposal is one which allows a barter or exchange system. Rather than receiving payments toward health insurance for donating or promising to donate, one could receive medical care in exchange. This system would protect the poor and effectively stifle the suggestion by opponents that the poor will sell their bodies to get money.

Another proposal, advocated by an economist, involves establishing a "futures market" in organs through which the right to remove an organ upon death would be purchased from the person while alive.²²³ The health insurance companies would arrange

221. See Moore, 793 P.2d at 498 (Arabian, J., concurring).

222. *Body Organ Sales Discussed as a Way To Increase Supply*, cited at note 211.

223. FOX & SWAZEY, cited at note 212, at 70 (citing H. HANSMANN, ORGAN TRANSPLANTATION POLICY: ISSUES AND PROSPECTS 57-85 (J.F. Blumstein & F.A. Sloan, eds., 1989)).

the purchases through provisions in insurance premium statements.²²⁴ People who did not want their organs used for transplantation simply would not sell a futures contract for their organs.²²⁵

Other proposals offer more blatant financial incentives. A tax break could be offered to anyone donating an organ or to a person's estate if that person donated organs. Death benefits could be awarded to the decedent's family or direct payment could be made to a living donor who donated a paired organ, such as a kidney.²²⁶ A donor would still have to consent to such a scheme before death, so that a family could not donate a relative's organs out of greed. One advantage to death benefits is that they might result in increased transplantation in minority populations, due to increased donations among the group which gives the fewest organs and needs the most.²²⁷ One doctor advocating death benefits suggests that rather than organ brokerage occurring, enough organs may be donated, as least as far as kidneys are concerned, to export to foreign countries also desperately in need of donations.²²⁸

An interesting proposal under serious consideration by the Mexican government is to designate cadaveric organ donors as "Heroes of the Nation," a status equivalent to war veterans. The government would then subsidize burial costs or offer the estate a tax abatement or grant. As one expert noted, "[s]uch a national policy . . . 'could exert a major psychological effect upon the public's acceptance of cadaver organ donation, without raising the specter of organ commerce.'"²²⁹ In other words, the key is to increase the prestige of organ donation while decreasing the negative implications of a commercial market in human organs.

CONCLUSION

As this comment points out, the current law regarding compensation for body organs and tissues is based upon a tradition of common law principles and concepts which cannot be adequately applied to the human body. The law needs to be changed to allow compensation for organs and tissues in order to increase the supply of much needed organs for transplantation and to achieve equity in the relationship of patient and researcher. Our society

224. FOX & SWAZEY, cited at note 212, at 70.

225. *Id.*

226. See Evans, cited at note 107, at 3117.

227. Peters, cited at note 215, at 1302-03.

228. *Id.* at 1303.

229. Randall & Marwick, cited at note 119, at 1228.

and culture values autonomy in decisions affecting our bodies. Privacy is essential to our legal system. Hence, the laws regulating or prohibiting compensation for organ and tissue donations must be amended in order to allow a governmentally regulated system which achieves some type of equitable compensation for organ and tissue donation. The scales of justice are tipped away from the interests of those who donate their organs and tissues out of blind adherence to tradition and fear of taking the first step toward equity. The legislature must address this issue and provide a system of compensation before organ and tissue donors realize that their charity is lining the pockets of researchers and hospitals, and they rebel and cease donating.

Danielle M. Wagner